UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 777

Cases No. 820: MANSOUR
No. 880: MANSOUR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry, Vice-President; Mr. Francis Spain;

Whereas, on 25 October 1994, Khalil Mohammed Mansour, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal, inter alia, to order:

"...

1. The rescission of the deferral of annual increment of 10 June 1993 (...) and all the subsequent disciplinary measures/administrative decisions which depended mainly on the foregoing deferral;

2. Reinstatement in my former post of Vehicle Maintenance Officer/SAR [Syrian Arab Republic];

3. The rescission of the contested new post description (...), which is the subject matter of my second appeal/second recommendation of [the] JAB [Joint Appeals Board] and Com[missioner]-Gen[eral] (...), and revers[ion] to the former post description, which is mainly connected with my Letter of Appointment (...);

4. The rescission of the decision of termination of appointment of 6 March 1994 (...), and consider[ation] of the period ever since my termination as a special leave with full pay;

5. [Payment of] 30,000, thirty thousand US dollars in compensation for the moral and financial harm and damage and injustice and prejudice."

On 10 October 1995, the Applicant filed a second application requesting the Tribunal, inter alia, to:

"...

(1) Consider the Joint Appeals Board's findings and recommendations (...) [of 14 July 1995] as ... evidence for my case (...) before the Tribunal as they contradict the assertions of UNRWA's officials;

(2) Give credence to the Board's recommendations mentioned above;

(3) Consider the period from March 6th, 1995 until my return to my ex-job as a working period;

(4) Return to status quo ante separation, so that I return to my ex-job as Vehicle Maintenance Officer, SAR, with a clean slate. Otherwise, UNRWA is to pay me my salary as of March 6th, 1994 until I reach 60 or until the winding up of UNRWA's works, whichever date is earlier, with a fair pension or termination indemnity equal to that of the other staff members with all rights accumulated due to these actions;

(5) UNRWA is to issue a statement of apology ... to regret the injustice I have encountered, to cancel all correspondence issued to maltreat me and to issue a new service certificate in my name based on the new clean slate; and

(6) [Order payment of] US$50,000.00 (fifty thousand US dollars) in compensation for moral and financial harms and damages, injustice and prejudice, including legal consultation fees, typing and copying, and other costs."

Whereas the Respondent filed his answer on 10 October 1995, in respect of case No. 820, and on 30 April 1996, in respect of case No. 880;

Whereas the Applicant filed written observations on 27 April 1996 in respect of case No. 820, and on 1 October 1996, in respect of case No. 880;

Whereas, on 9 November 1996, the Applicant filed an additional document with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, an area staff member, entered the service of UNRWA in the Syrian Arab Republic (SAR) on 3 October 1974, as a Trade Instructor at the Damascus Vocational Training Centre, on a six-month fixed-term appointment, at grade 9. His appointment was converted to a temporary indefinite appointment, with effect from 1 September 1975. On 8 November 1979, the Applicant resigned. On 12 May 1988, he re-entered the service of UNRWA, SAR, as a Vehicle Maintenance Officer (VMO) at grade 12, step I, on a temporary indefinite appointment. With effect from 6 March 1994, the Applicant's appointment was terminated, under staff rule 109.1, and he separated from service.

The Applicant's periodic report dated 4 March 1993, which was completed on 7 June 1993, contained low ratings in seven of ten "Performance and Personality Factors". His overall rating was the second lowest of five ratings, "a staff member who maintains only a minimum standard of efficiency".

In a memorandum dated 4 June 1993, to the Field Supply and Transport Officer, SAR, the Vehicle Workshop Inspector gave an evaluation of the vehicle workshop staff, including the Applicant. Citing several examples of the Applicant's poor performance, he concluded "In my opinion, he is the most incompetent VMO I ever met and his performance, instead of becoming better, was getting far worse than anybody expected."

Following a recommendation by the Applicant's supervisor, on 10 June 1993, the Field Personnel Officer informed the Applicant that, based on his periodic report completed on 7 June 1993, his salary increment would be deferred for three months. In a letter dated 5 July 1993 to the Director of UNRWA Affairs (DUA), the Applicant objected to this decision, noting that he had been given additional work that was not part of his job description. He concluded that the real reason for the deferral was not mentioned in the letter of 10 June 1993.

In a reply dated 14 July 1993, the DUA informed the Applicant that "... the decision to defer your annual increment for three months was correct. It is clear from the file that your performance has deteriorated from its previous acceptable level and it is also clear that this deterioration in your performance has been discussed with you on several occasions and that you, yourself, have acknowledged it". He suggested that the Applicant "devote more energy and attention to the practical requirements of your job to raise your level of performance back to an acceptable level". On 3 August 1993, the Applicant lodged an appeal against this decision (the first appeal) with the Joint Appeals Board (JAB).

On 9 August 1993, the Applicant submitted a "criticism of materials form" criticizing Volkswagen spare parts that did not conform to specifications and that showed both faulty workmanship and faulty material. The Field Supply and Transport Officer (FSTO) signed the criticism of materials form on 19 August 1993. By letters to the FSTO and others, the Applicant documented several other instances in which he believed that spare parts delivered to him were faulty. He alleges that the actions taken against him by UNRWA were in retaliation for his reports concerning the inferior quality of spare parts and tyres being used by the Agency.

On 12 August 1993, the Applicant's post description was altered, as a result of a reorganization of the Supply and Transport Department. In a letter dated 19 August 1993 to the DUA, the

Applicant stated that "there are many additional works added to my job" and that these new responsibilities "do not match my grade, which should be increased at least 2 grades". In a reply dated 30 August 1993, the Field Administration Officer, SAR, informed the Applicant that the Management Services Division had "evaluated the post description and checked it for responsibilities and assigned it the grade of 12." On 12 September 1993, the Applicant lodged an appeal against this decision (the second appeal) with the JAB.

In the Applicant's periodic report dated 6 September 1993, his supervisor gave him low ratings in five out of ten categories, with an overall rating as "a staff member who maintains only a minimum standard of efficiency". He recommended that the Applicant's annual increment be deferred until the end of the reporting year. In a letter to the DUA dated 16 November, the Applicant noted that he had not seen the foregoing periodic report and that it had not been discussed with him.

The Applicant's periodic report dated 30 January 1994 gave the Applicant low ratings in seven out of ten categories; his overall rating was "a staff member who maintains only a minimum standard of efficiency". The Applicant's principal supervisor noted "the extreme negligence of this staff member".

In a letter dated 6 March 1994, the Officer-in-Charge, UNRWA, SAR, informed the Applicant that "because of the unsatisfactory performance you rendered during the past year and following the less than satisfactory periodic report completed by your supervisor on 30 January 1994, it has been decided to terminate your appointment in the interest of the Agency under the provisions of staff rule 109.1, effective close of business on 6 March 1994".

The Applicant appealed this decision in a letter to the DUA, SAR, dated 22 March 1994, and requested reinstatement. On 6 April 1994, the DUA, SAR, informed the Applicant that "I have reviewed your case and the decision taken by the Officer-in-Charge of UNRWA

Affairs, Syria and regret to inform you that I am unable to accede to your request for cancellation of your termination".

On 22 July 1994, the JAB submitted its report to the Commissioner-General on the Applicant's first and second appeals. The JAB's evaluation and recommendation read, in part, as follows:

"(A) The Appellant's first appeal of 3 August 1993 against the Administration's decision to defer his annual increment due on 1 May 1993 for a period of three months:

3. ..., the Board is of the opinion that the Administration acted within the framework of standing rules and regulations; and, the Board could not establish that, based on the evidence adduced, the decision appealed from has been vitiated by prejudice or any other extraneous factors.

The Board is also of the opinion that, in accordance with the provisions of Area staff rule 111.1(3), the Board cannot consider the substantive question of the Appellant's efficiency which is a purely managerial aspect of the case.

However, the Board wishes to make the following reservations about the Appellant's periodic report dated 4 March 1993:

(a) The Board noted that, although dated 4 March 1993 with a deadline to be returned before 15 April 1993 and despite the fact that the Appellant's annual increment was due effective 1 May 1993, the report was not completed until 7 June 1993.

The Board finds that this action on the part of the Administration is not justified.

(b) The Board also noted that parts 2-4 of the report were completed by one person, namely, the Field Supply and Transport Officer. This, in the Board's opinion, infringes the Instructions for Completing a Periodic Report as set out on the report itself and in personnel directive A/14.

(B) The Appellant's second appeal of 12 September 1993 requesting upgrading of his position:

By reference to Area staff regulation 11.1(A) governing appeals, the Board resolved that it is not within its jurisdiction to entertain this appeal as the decision appealed from does not constitute an administrative decision within the meaning of the above referenced regulation.

IV. Recommendation

17. In view of the foregoing, and without prejudice to any further oral or written submissions to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation:

(a) To uphold the Administration's decision to defer the Appellant's annual increment due on 1 May 1993 for a period of three months; and that the Appellant's appeal of 3 August 1993 be dismissed, and

(b) To uphold the Administration's refusal to upgrade the Appellant's post; and that the Appellant's appeal of 12 September 1993 be rejected."

On 2 August 1994, the Officer-in-Charge, Headquarters transmitted a copy of the JAB report to the Applicant and informed him as follows:

"With regard to your appeal concerning deferment of your annual increment, you will note that the Board found that the Administration acted within the framework of standing Regulations and Rules, and that it could not be established that the administrative decision which is the subject of the appeal was vitiated by prejudice or any other extraneous factors. With regard to your second appeal concerning upgrading of your former position as Vehicle Maintenance Officer, the Board resolved that it was not within its jurisdiction to entertain this appeal, as the decision appealed from does not constitute an administrative decision within the meaning of Area staff regulation 11.1(A) concerning appeals.

Based on these findings, the Board unanimously made its recommendations to uphold the Administration's decisions in both appeals, and to dismiss your first appeal and reject the second. I accept the Board's findings and recommendations, and therefore your first appeal stands dismissed, and your second is rejected as not falling within the applicable staff regulation."

In the meantime, on 17 October 1993, the Applicant lodged an appeal with the JAB against the second deferral of his annual increment (the third appeal), which was communicated to him in a letter dated 20 September 1993 from the Field Personnel Officer. On 3 January 1994, the Applicant lodged an appeal with the JAB against the decision communicated to him in a letter dated 9 November 1993, from the Field Personnel Officer, SAR, to defer his annual increment until 30 April 1994 (the fourth appeal). On 19 April 1994, the Applicant lodged an appeal with the JAB against the 6 March 1994 decision to terminate his services in the interest of the Agency (the fifth appeal).

On 14 July 1995, the JAB submitted its report to the Commissioner-General with respect to the Applicant's third, fourth and fifth appeals. Its considerations and recommendation read, in part, as follows:

"...

A. The Appellant's personal file reflects an outstanding record of performance from the date of his re-employment in 1988 until 1993. In fact the Appellant has been rated as an efficient staff member giving rather more than average satisfaction'. He also received several letters of commendation from his supervisors on many occasions.

...

B. The Appellant's ordeal started in 1993 when he initiated complaints and objections against the quality of some commodities received by the Field Supply Division from Headquarters, Vienna, such as the Semperit tyres, Varta

batteries and VWLT40 spare parts. The Appellant's complaints were of technical nature.

The Board here noted that the Appellant refused to sign a letter dated 29 June 1993, prepared by the Field Supply and Transport Officer, and sent to the Appellant for signature. The said letter states that the Appellant confirms that 'the tyres received form Semperit on the above purchase order were new when received in August 1992 and not second hand'.

The Appellant contends that he was told by the Field Supply and Transport Officer that he would be harmed if he refuses to sign that letter.

The Board noted that the Field Supply and Transport Officer states in his letter dated 4 July 1993 addressed to the Appellant that 'I did not say you would be harmed and my comment was meant as advice not a threat'.

C. The Appellant's periodic report of 4 March 1993 was completely filled out by one person, namely, the Field Supply and Transport Officer. This report was due to be filled out by 15 April 1993. However, it was not completed until 7 June 1993, i.e. until after the visit of the Procurement Evaluation Team.

D. The Vehicle Workshop Inspector conducted his visit to Damascus Workshop in March 1993, but did not submit his report until 4 June 1993.

He states in the said report that 'In my opinion he [the Appellant] is the most incompetent VMO [Vehicle Maintenance Officer] I ever met and his performance instead of becoming better was getting far worse than anybody expected'.

This statement and the enthusiasm of its wordings, in the Board's opinion, cannot reflect neutrality.

It is also worthwhile to note here that the Vehicle Workshop Inspector criticized in his report both the Appellant (who was the Vehicle Maintenance Officer) and the Head Mechanic; the Appellant's services were terminated while the Head Mechanic was later promoted to the post of Vehicle Maintenance Officer.

E. The Administration's decision to defer the Appellant's annual increment for a second time was based on the so-

called unsatisfactory performance of the Appellant as reflected in his periodic report of 9 June 1993. By reference to this periodic report, the Board noted the following:

'(1) The report is again completed by the Field Supply and Transport Officer in all three parts of it, thus infringing the Instructions for Completing a Periodic Report as set out on the report itself and in personnel directive A/14.

(2) ...

The Board here believes that the overall rating is not consistent with the average of the ratings of Part 2 of the report.

The overall rating should have been 'a staff member who maintains a good standard of efficiency' i.e. to reflect satisfactory performance.

F. Effective close of business on 6 March 1994, the Appellant's services were terminated in the interest of the Agency.

This decision was based on the Appellant's unsatisfactory performance as reflected in his periodic report of January 1994. The Board, after examining the said periodic report, makes the following observations:

(1) All three parts of the report, as in the previous cases, are all completed by one person, again infringing the relevant instructions.

(2) The Acting Field Supply and Transport Officer completed Part 2 of the report, the part which is supposed to be completed by the immediate technical supervisor, ignoring the fact that in July 1993, the post of Technical Operations Officer was created in the Syrian Field acting as immediate supervisor to the Vehicle Maintenance Officer (the Appellant).

IV. Recommendation

25. In view of the foregoing, the Board unanimously makes its recommendation that the administrative decisions appealed against be reviewed with a view to:

A. Reinstating the Appellant in the Agency's service in his original post of Vehicle Maintenance Officer or in any other post commensurate with his qualifications, experience and previous remunerations, and

B. Paying the Appellant his entitled annual increment as of 1 August 1993, the date of its deferment."

In a letter dated 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

I have carefully reviewed the Board's report. Regarding the termination of your services in the interest of the Agency pursuant to Area staff regulation 9.1, I find that there is substantial evidence that your performance had been unsatisfactory, and that, despite repeated warnings, your performance did not improve. Therefore, I find that the termination of your services was fully supported by the evidence and was justified. Similarly, with respect to the deferral of your annual increment which you have also appealed, this administrative action is fully supported by the evidence. In view of the above, I do not accept the Joint Appeals Board's conclusions and recommendations, and the administrative decisions are upheld. Your appeal is, therefore, dismissed."

On 25 October 1994, the Applicant filed with the Tribunal the application concerning his first and second appeals. On 10 October 1995, he filed a second application concerning his third, fourth and fifth appeals.

Whereas the Applicant's principal contentions are:

1. The deferral of the Applicant's increment was improperly motivated, as it was a retaliatory measure against him for raising a concern about the quality of tyres being provided for use by the Agency.

2. The Applicant's workload has doubled, without any addition in staff. His increased responsibilities should be graded at a higher level.

3. The Applicant's annual increment was improperly deferred a second time, for a further five months.

4. The period for which the Applicant's annual increment was deferred was incorrect.

5. Termination of the Applicant's appointment was improper.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim that the deferral of his annual increment should be rescinded relates to a decision correctly taken, in accordance with the relevant provisions of the Area Staff Rules. The Applicant's contention that deferral of his increment was related to the "tyres issue" was not raised in his appeal to the JAB and is therefore not properly before the Tribunal.

2. The failure to agree to the Applicant's request that his post be graded at a higher level does not constitute an administrative decision and is therefore not reviewable. The Applicant's request that his former post description be reinstated is not properly before the Tribunal as it was not raised before the JAB.

3. Termination of the Applicant's services was in the interest of the Agency.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant, who was a Vehicle Maintenance Officer (VMO), grade 12, working for UNWRA (the Agency) on a temporary indefinite contract in the Syrian Arab Republic (SAR), has lodged five appeals contained in two separate applications that are before the Tribunal

as cases No. 820 and No. 880. The Applicant's first appeal is against the decision of the Agency, dated 10 June 1993, to withhold the Applicant's annual increment that was due on 1 May 1993. The second appeal is against the revised description of the Applicant's post, which the Applicant alleges is a breach of his contract. The Applicant characterizes his third appeal as being in connection with the second deferral of his annual increment. The fourth appeal is related to the unannounced deferral of his annual increment for one month and the fifth appeal is against his separation from service. In its report of 2 August 1994, covering the Applicant's first two appeals, the Joint Appeals Board (JAB) dismissed the appeal contesting the deferral of the Applicant's annual increment, since it found that the Agency had not acted with prejudice. The JAB rejected the Applicant's appeal contesting the revision of his post description as Vehicle Maintenance Officer, ruling that it was beyond the scope of the JAB's jurisdiction. In its report of 14 August 1995, covering the third through fifth appeals, the JAB found that the Administration's actions were not in conformity with standing rules. It recommended that the Applicant be reinstated and that his annual increment be paid. Notwithstanding the JAB's findings, the Applicant contests the characterization of his appeals as interrelated. The Tribunal does not agree with the Applicant on this point. On the contrary, the Tribunal finds that these appeals are closely related to each other and will deal with them in a single judgement.

II. The question presented is whether the Applicant was subject to discrimination resulting from the decisions of the Administration to defer successively the Applicant's annual increments, to revise the description of his post and, ultimately, to terminate his appointment. The Applicant contends that the Administration's actions against him come as a direct result of his submission of a report detailing the inferior quality of vehicle tyres, which the

Applicant believes were stealthily renovated and passed off as new, and the existence of counterfeit spare parts. The Respondent maintains that the deferrals of the Applicant's annual increments were proper, since these decisions were taken in accordance with Area staff rule 103.2. Under that rule, annual increments will be given only to those staff members whose service has been satisfactory. In support of this position, the Respondent points to the Applicant's periodic evaluation report (PER) dated 4 March 1993, in which the Applicant is rated overall as "a staff member who maintains only a minimum standard of efficiency." In addition, the Respondent refers to a report made by the Vehicle Workshop Inspector, dated 4 June 1993, decribing the Applicant as "the most incompetent VMO I ever met." The JAB found, however, that this PER, like the two PERs following it, was completely filled out by one person, the Field Supply and Transport Officer. This infringed the Instructions for Completing a Periodic Report that were set out in the report itself and in personnel directive A/14. In addition, the JAB found that although dated 4 March 1993 and despite the fact that the Applicant's annual increment was due on 1 May 1993, the PER was not completed until 7 June 1993. The JAB also disagreed with the overall rating for the Applicant. The Tribunal agrees with the JAB's finding that the PERs were not completed properly or in a timely manner. It also notes the JAB's finding that until 1993, the Applicant received favourable performance evaluations.

The Respondent also submits that the Applicant did not raise with the JAB the issue of the quality of tyres used on the Agency's vehicles as being the reason behind the Agency's decision to defer his annual increment. The Respondent contends that this issue is therefore not properly before the Tribunal. (Judgement No. 624, Muhtadi, (1993)). The Tribunal finds, however, that the issue of discrimination was raised by the Applicant in his communications with the Agency concerning the deferral of his annual increment and that, consequently, the issue is properly before the Tribunal.

III. With respect to the revision of the Applicant's post description, the Applicant maintains that the new description adds many duties to his current responsibilities, effectively doubling his work. Before the JAB, the Applicant requested a review of the "decision" not to promote him to a higher grade in view of the new post description. Before the Tribunal, the Applicant requests a rescission of the new post description. The Respondent contends that, because the question of whether there were grounds for the revision of the Applicant's post description was not an issue before the JAB, it should not be considered by the Tribunal. (Judgement No. 624, Muhtadi (1993)). Further, the Respondent maintains that even if this issue were properly before the Tribunal, there are no grounds for rescission of the new post description since the Tribunal may not, in matters relating to job classification, substitute its judgement for that of the Agency. Its review is limited to considering whether there has been a "material error in procedure or substance". The Tribunal finds that the issue is properly before it, in that in requesting a review by the JAB of the decision not to promote the Applicant, the question of post description arose. The Tribunal finds that there has not been a "material error in substance or procedure" with respect to the revision of the Applicant's post description and therefore rejects the request for its revision.

IV. As to the termination of the Applicant's services, the Applicant contends that this is the culmination of a "chain of unjust actions", motivated by bias and prejudice. He maintains that the evaluations of his performance were part of a conspiracy to silence him. The Respondent argues that the onus is on the Applicant to demonstrate that the administrative decisions of which he complains were motivated by prejudice, bias or extraneous factors, but that he has failed to do so. The Respondent maintains that the Applicant's services were terminated for unsatisfactory

performance. The Tribunal, taking account of all the circumstances of the case, considers that the decision of the Secretary-General is within the scope of his discretion.

V. However, as the JAB points out, there were certain procedural irregularities with respect to the evaluation of the Applicant's performance, for which he is entitled to compensation. The Tribunal assesses its amount at $1,000.

VI. For the foregoing reasons, the Tribunal:

(1) Orders the Respondent to pay the Applicant $1,000.

(2) Rejects all other pleas.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary